

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ANTHONY DULAK,

Defendant-Appellant.

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UNPUBLISHED

May 10, 2011

No. 296639

Menominee Circuit Court

LC No. 08-003253-FC

Before: RONAYNE KRAUSE, P.J., and SERVITTO and GLEICHER, JJ.

PER CURIAM.

Following a seven-day jury trial, a jury convicted defendant of first-degree felony murder, MCL 750.316(1)(b) (homicide during a robbery or larceny). The trial court sentenced defendant as a second habitual offender, MCL 769.10, to life imprisonment without the possibility of parole. Defendant appeals as of right. We affirm.

Defendant's conviction arose out of the beating death of Mark Keller, in Keller's home, and the theft of items from the home. At trial, defendant did not contest his involvement in stealing items from Keller's home but maintained that his two accomplices were responsible for Keller's death. One of these accomplices, Keith Benson, testified at length against defendant pursuant to a plea agreement. In addition, defendant's trial counsel introduced a statement from the other accomplice, Guy Buck. Other witnesses testified concerning defendant's drug use, defendant's drug transactions with Keller, and defendant's conduct and appearance during the weekend of the crime.

After the trial court sentenced defendant, Benson sent a letter to the court. In the letter, Benson indicated that he had made false statements at trial and also recounted a somewhat revised version of the crime. Defendant filed a motion in this Court seeking a remand on the basis of Benson's letter as newly discovered evidence. This Court denied the motion for failure to persuade the Court of the necessity of remand at the time of the motion.

Defendant now reasserts his request that the Court remand the case for an evidentiary hearing concerning the need for a new trial as a result of Benson's letter. The Court's previous ruling on the motion does not constitute law of the case, because the Court did not decide the motion on the merits. See *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). Now, however, having reviewed the merits of defendant's request on appeal, we conclude that no remand is needed.

To warrant a remand, defendant must demonstrate “(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial.” *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003), quoting *People v Johnson*, 451 Mich 115, 188 n 6; 545 NW2d 637 (1996). Defendant has failed to fulfill the fourth step of the *Cress* test. At best, Benson’s letter would provide additional impeachment evidence against Benson, because cross-examination of Benson at trial confirmed he had previously altered his story regarding the crime and that Benson was testifying pursuant to a plea agreement. This evidence significantly challenged Benson’s credibility; in contrast, Benson’s letter presents a minimal credibility issue with regard to the allegations against defendant. Benson’s letter further shifts responsibility for Keller’s death toward defendant and away from Benson. In sum, the letter contains nothing to suggest that the outcome of defendant’s trial would be different if the letter were introduced into evidence on retrial.

Defendant next asserts that his trial counsel was ineffective for failing to object to the following: autopsy photographs, character evidence, and alleged prosecutorial misconduct, and for introducing Buck’s statements at trial. Because we find that the evidence at issue was admissible and that there were no instances of prosecutorial misconduct, we reject defendant’s assertions. The determination as to whether counsel was ineffective is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The factual findings are reviewed for clear error, and the matters of law are reviewed de novo. *Id.* Because this issue was not raised below, there are no factual findings to be reviewed. To prevail, defendant must show that counsel made errors and that those errors were so serious that the result of the trial was unreliable. *Id.* at 578. In our analysis, we presume that counsel was effective, and defendant bears the heavy burden of showing that counsel was not effective. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). In addition, defendant must show that counsel’s decisions did not constitute sound trial strategy. *Id.* at 715.

We acknowledge that the autopsy photographs in this case are grisly. The nature of photographs, however, does not warrant exclusion of the photographs from evidence. *People v Unger (On Remand)*, 278 Mich App 210, 257; 749 NW2d 272 (2008). Where, as here, the nature of a victim’s brain injuries are at issue, autopsy photographs are admissible to assist the jury in understanding medical testimony concerning the cause of death. *Id.*

In addition, the photographs were relevant to the other elements of the charged crime. A prosecutor must present evidence on every element of a crime, regardless of whether the element is disputed at trial. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 544; 775 NW 2d 857 (2009). For the felony-murder charge, the prosecutor had to prove, among other things, that defendant struck Keller with the intent to kill, with the intent to do great bodily harm, or to create a very high risk of death or great bodily harm. MCL 750.316(1)(b); *People v Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007). The autopsy photographs were relevant to allow the jury to assess the extent and nature of the blows to Keller’s head and torso. Given that the photographs were admissible, trial counsel cannot be deemed ineffective for failing to object to the photographs. Counsel is not required to pursue meritless objections. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). In fact, making such an objection may bring more attention to the exhibits.

Similarly, the evidence of defendant's drug use and of his criminal experience was admissible both as proof of defendant's motive for the crime and as evidence of the context of the crime. See *People v Rice (After Remand)*, 235 Mich App 429; 597 NW2d 843 (1999); *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). Because the evidence was admissible, no error can be assigned to trial counsel for failing to object. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

Regarding the allegations of prosecutorial misconduct, we review unpreserved claims of prosecutorial misconduct for plain error affecting a defendant's substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). We find no plain error in the record before us. A prosecutor may not present irrelevant evidence solely to engender sympathy from the jurors. *People v Bahoda*, 448 Mich 261, 266; 531 NW2d 659 (1995). Here, however, the evidence concerning Keller's disability and the gruesome circumstances of his death were matters in evidence, and the prosecutor could properly argue reasonable inferences from that evidence. *Id.* Likewise, the prosecutor's references to defendant's credibility were appropriately based upon the evidence. See *People v Dobek*, 274 Mich App 58, 72; 732 NW2d 546 (2007).

On the matter of trial counsel's decision to introduce Buck's statement, we conclude that the decision was a matter of trial strategy. Defendant argues on appeal that the strategy was wholly ineffective and was an erroneous relinquishment of defendant's right to confront Buck. The United States and the Michigan Constitutions ensure that defendants in criminal prosecutions have the opportunity to confront witnesses against them. US Const, Am VI; Const 1963, art 1, §20. The Confrontation Clause precludes a witness from testifying about the testimonial statement of an unavailable witness, unless the defendant has had a prior opportunity to cross-examine the unavailable witness. *Crawford v Washington*, 541 US 36, 53-54, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

At trial, defendant's counsel acknowledged that her strategy regarding Buck's statement was to demonstrate that the co-defendants were attempting to shift blame to one another and that the waiver of any confrontation right was intentional. Given the extent of the evidence against defendant, counsel had to make strategic decisions about the most effective means to defuse Benson's testimony. This Court presumes that these types of decisions, concerning what evidence to present and whether to call certain witnesses, are matters of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Defendant has not overcome the heavy burden of demonstrating that the strategy amounted to ineffective assistance of counsel. *Rodgers*, 248 Mich App at 714-715.

Affirmed.

/s/ Amy Ronayne Krause  
/s/ Deborah A. Servitto  
/s/ Elizabeth L. Gleicher